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AFFIN BANK BHD v. GOH HOCK HAI

HIGH COURT MALAYA, PULAU PINANG

AHMAD SHAHRIR MOHD SALLEH JC

[SUMMONS NO: 22NCVC-365-2011]

12 APRIL 2018

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CONTRACT: *Agreement – Guarantee – Demand guarantee – Claim for payment – Notice of demand – Two notices of demand issued – Cause of action – Whether accrued after demand made against guarantor – Whether time started to run from date of first notice of demand – Whether first notice of demand ceased to be valid – Whether cause of action arose from date of second notice of demand – Whether claim statute barred – Whether claim commenced more than six years after expiry of limitation period – Limitation Act 1953, s. 6(1)(a)*

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LIMITATION: *Cause of action – Accrual of – Demand guarantee – Notice of demand – Two notices of demand issued – Cause of action – Whether accrued after demand made against guarantor – Whether time started to run from date of first notice of demand – Whether first notice of demand ceased to be valid – Whether cause of action arose from date of second notice of demand – Whether claim statute barred – Whether claim commenced more than six years after expiry of limitation period – Limitation Act 1953, s. 6(1)(a)*

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The plaintiff granted, in favour of the borrower, banking facilities for business purposes. The banking facilities were made up of (i) a term loan of RM1,085,000; (ii) an overdraft facility of RM200,000; and (iii) letters of credit for RM5,000,000 ('tradelines'). As security for the banking facilities, the borrower charged three pieces of land in favour of the plaintiff. A further security in the form of a guarantee agreement was also executed by the defendant and two other guarantors to jointly and severally guarantee the payment of the banking facilities by the borrower. All the three respective charges were later discharged and the plaintiff ceased from holding any security from the borrower. The banking facilities were later restructured by the plaintiff. The monthly repayment for the term loan 1 was revised and the tradelines was converted into term loan 2. The borrower later defaulted in repayment of the restructured banking facilities. The plaintiff sent a notice of demand dated 3 April 2001 ('first notice of demand') to the borrower and the defendant respectively to claim for the outstanding sum in respect of the overdraft, term loan 1 and term loan 2. The plaintiff obtained judgment against the borrower and the other two guarantors. Since the termination of the banking facilities, the borrower had made payments to the plaintiff amounting to RM1,630,000 leaving an outstanding balance of RM7,023,217.43 in respect of term loan 2. The plaintiff then sent a notice of demand dated 25 February 2011 ('second notice of demand') to the defendant to claim for the said outstanding balance. The plaintiff did not receive any payment from the defendant and the plaintiff commenced the

present action against the defendant. The defendant contended that the plaintiff's claim was statute barred under s.6(1)(a) of the Limitation Act 1953. According to the defendant, time started to run from the date of the first notice of demand on 3 April 2001 which meant that the six year limitation period expired on 2 April 2007. The plaintiff, however, submitted that the plaintiff's claim against the defendant herein was made after the second notice of demand was issued for the sum of RM7,023,217.43 and, as such, it was well within the limitation period since the second notice of demand was dated 25 February 2011 whereas the writ was filed on 31 May 2011.

Held (dismissing plaintiff's claim with costs):

- (1) The guarantee in question was a demand guarantee whereby the cause of action would only accrue after the demand was made against the guarantor. A perusal of the first notice of demand showed that a valid and proper demand had been made by the plaintiff against the defendant in accordance with the guarantee. Being a demand guarantee which necessitated the issuance of a demand against the defendant pursuant to the terms of the guarantee before the accrual of the plaintiff's cause of action was triggered, the plaintiff's cause of action commenced from the deadline stipulated in the demand. The first notice of demand specified a seven day deadline from the date of the notice, which meant that the plaintiff's cause of action against the defendant had commenced on 10 April 2001. (paras 25 & 28)
- (2) It was clearly stated in the first notice of demand addressed to the borrower that any payment made which was lesser than the amount demanded should be accepted without prejudice to the plaintiff's right to proceed with legal action for full recovery of the outstanding loan. It meant that the plaintiff could still pursue legal action if it did not receive the full amount demanded and notice of the same too had been given to the defendant. Therefore, the payment of RM1,630,000 did not make the first notice of demand ineffective necessitating issuance of the second notice of demand to trigger the plaintiff's cause of action against the defendant. The plaintiff's cause of action having arisen on 10 April 2001 had expired when the six year limitation set in on 9 April 2007. The plaintiff's claim against the defendant was therefore statute barred as it was commenced more than six years after the expiry of the limitation period. The plaintiff had failed to prove its claim against the defendant on the balance of probabilities. (paras 30, 31 & 37).

A Case(s) referred to:

- Affin Bank Bhd v. Joseph Thambirajah* [2004] 6 CLJ 201 HC (*refd*)
Arab-Malaysian Credit Bhd v. Ngui Ing Kang & Ors [2007] 1 LNS 98 HC (*refd*)
CIMB Bank Bhd v. Khairudin Damhoeri [2011] 3 CLJ 687 HC (*refd*)
Heng Cheng Swee v. Bangkok Bank Ltd [1979] 1 LNS 179 FC (*refd*)
Hong Leong Bank Bhd v. M Muthiah & Anor And Another Appeal [2014] 1 CLJ 1 FC (*refd*)
- B** *Joseph Thambirajah v. Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)* [2008] 2 MLJ 773 CA (*refd*)
Malaysia Building Society Bhd v. Song Ah Tu [2007] 10 CLJ 328 HC (*refd*)
Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 SC (*refd*)
- C** *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157 CA (*refd*)
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA (*dist*)
Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC (*refd*)
Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd [2005] 3 CLJ 825 FC (*dist*)
- D** *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440 CA (*refd*)
The Pacific Bank Bhd v. Kerajaan Negeri Sarawak [2015] 3 CLJ 717 FC (*refd*)
YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC (*refd*)

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), 21(1)

- E** Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)

For the plaintiff - Chan Shao Hang & Karen Mak; M/s Shahrizat Rashid & Lee

For the defendant - Amareson; M/s Amareson & Meera

Reported by Suhainah Wahiduddin

F JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Introduction

- G** [1] The plaintiff granted the defendant a banking facility. The defendant defaulted in repayment and the plaintiff commenced an action for recovery of the outstanding balance. The plaintiff called one witness while the defendant did not call any witness and later made a submission of no case to answer. At the end of the trial, I dismissed the plaintiff's claim with cost. The plaintiff is not satisfied with the decision and filed an appeal. This is the
- H** grounds for the decision.

Brief Facts

- I** [2] The plaintiff granted in favour of the borrower, HGM Machinery Sdn. Bhd. (formerly known as Handee Engineering And Consultancy Services Sdn. Bhd.), banking facilities to purchase a factory lot at Mak Mandin Industrial Estate and for other business purposes. The banking facilities were

made up of (1) a term loan of RM1,085,000; (2) an overdraft facility of RM200,000; and (3) letters of credit/ trust receipt/ bankers' acceptance for RM5,000,000 ("tradelines").

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[3] As security for the banking facilities, the borrower charged three pieces of land in favour of the plaintiff. A further security in the form of a guarantee agreement dated 14 August 1997 (exh. P3) was also executed by the defendant and two other guarantors to jointly and severally guarantee the payment of the banking facilities by the borrower.

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[4] All the three respective charges were later discharged and the plaintiff had ceased from holding any security from the borrower. At the request of the borrower, the banking facilities were later restructured by the plaintiff on 2 December 1999. The monthly repayment for the term loan 1 was revised and the tradelines was converted into term loan 2.

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[5] The borrower later defaulted in repayment of the restructured banking facilities. The plaintiff then sent a notice of demand dated 3 April 2001 ("first notice of demand") (exh. P7) to the borrower (at pp. 185 to 186 of the common bundle of documents) and the defendant (at p. 187 of the common bundle of documents) respectively, to claim for the outstanding sum, as at 28 February 2001, of RM207,905.51 in respect of the overdraft, RM843,850.68 in respect of term loan 1 and RM5,517,596.34 in respect of term loan 2. Under the first notice of demand too, the plaintiff gave notice to the borrower that the banking facilities have been terminated.

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[6] The plaintiff later filed an action against the borrower, the defendant and the other two guarantors *vide* Summons No: 22-200-2001 at the High Court of Penang ("2001 Suit"). On 19 May 2001 the plaintiff obtained judgment against the borrower and the other two guarantors. The action against the defendant in the 2001 Suit was withdrawn with liberty to file afresh because the plaintiff was unable to serve the writ on the defendant. Since the termination of the banking facilities, the borrower had made payments to the plaintiff amounting to RM1,630,000 leaving an outstanding balance of RM7,023,217.43 in respect of term loan 2.

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[7] The plaintiff then filed another action to recover the outstanding balance of RM7,023,217.43 but this action was only filed against the defendant, namely Summons No: 22-183-2005 ("2005 Suit"). The 2005 Suit was short-lived as it was later withdrawn with liberty to file afresh by the plaintiff itself. According to the plaintiff, the withdrawal of the 2005 Suit with liberty to file afresh was not objected to by the defendant. The plaintiff reasoned that the 2005 Suit was based on the first notice of demand. Since payments made by the borrower had satisfied the overdraft and term loan 1 leaving only outstanding balance for term loan 2, the plaintiff should issue another notice of demand before it could file an action against the defendant.

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A [8] The plaintiff then sent a notice of demand dated 25 February 2011 (“second notice of demand”) (exh. P13) to the defendant to claim for the outstanding balance of RM7,023,217.43 as of 28 February 2005 in respect of term loan 2. The plaintiff did not receive any payment from the defendant and the plaintiff commenced the present action against the defendant.

B [9] At the trial of the action, the plaintiff called one witness while the defendant elected not to call any witnesses and made a submission of no case to answer. The plaintiff produces a certificate of indebtedness dated 28 February 2005 (exh. P14) showing the amount of RM7,023,217.43 as due and owing from the defendant to the plaintiff.

C **Brief Deliberation Of Parties**

Contention Of The Plaintiff

D [10] Learned counsel for the plaintiff contends that the plaintiff’s cause of action arose from the date the second notice of demand was sent. It is argued that the first notice of demand ceased to be a valid demand against the defendant because after it was issued, part payment in the sum of RM1,630,000 was made.

E [11] In contending that the plaintiff’s right to claim against the defendant only arose upon a demand being made, learned counsel for the plaintiff refers to the decision of the Supreme Court in the case of *YM Orang Kaya Menteri Paduka Dato’ Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd* (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC. Learned counsel for the plaintiff argues that the plaintiff’s claim against the defendant in the present action was made after the second notice of demand was issued for the sum of RM7,023,217.43 and as such it is well within the limitation period since the second notice of demand was dated 25 February 2011 whereas the writ was filed on 31 May 2011.

G [12] Learned counsel for the plaintiff refers to the cases of *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440 CA and *Arab-Malaysian Credit Berhad v. Ngui Ing Kang & Ors* [2007] 1 LNS 98 and contends that when the earlier action against the defendant was withdrawn, there was no notice of demand issued against the defendant to claim for the sum of RM7,023,217.43. Learned counsel for the plaintiff further refers to the cases of *Affin Bank Bhd v. Joseph Thambirajah* [2004] 6 CLJ 201 and *CIMB Bank Bhd v. Khairudin Damhoeri* [2011] 3 CLJ 687.

I [13] Learned counsel for the plaintiff refers to the case of *Malaysia Building Society Bhd v. Song Ah Tu* [2007] 10 CLJ 328 and contends in the alternative that the defendant is not entitled to raise limitation as a defence because of cl. 17 of the letter of guarantee which provides as follows:

As a separate and independent stipulation, I/we agree that any sum or sums of money which may not be recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the Customer or by any other fact or circumstances and whether known to you or not shall nevertheless be recoverable from me/us or each of us as sole or principal debtors and shall be paid by me/us on demand.

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[14] It is argued that cl. 17 of the letter of guarantee in the present action is similar with the disputed clause in *Malaysia Building Society Bhd's* case and as such, it should apply on all fours. Reference is also made to *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 whereby the Court of Appeal observed that the general rule governing limitation of action will not apply if it has been excluded by the true nature of the contract made between the parties.

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[15] Learned counsel for the plaintiff also contends that the defendant is also liable as a principal debtor pursuant to the wordings of the same cl. 17 of the letter of guarantee. Since the plaintiff's claim is based on the letter of offer for the banking facilities and the three charges created as security, the limitation period would be 12 years by virtue of s. 21 of the Limitation Act 1953 and thus, the plaintiff's action is not statute-barred. The case of *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825 FC was referred to in support of the proposition.

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Contention Of The Defendant

[16] The defendant's main contention is that the plaintiff's claim is statute-barred. According to learned counsel for the defendant, time starts to run from the date of the first notice of demand on 3 April 2001 which means that the six-year limitation period shall expire on 2 April 2007. The cases of *Joseph Thambirajah v. Bank Buruh (M) Bhd (now known as BSN Commercial Bank (M) Bhd)* [2008] 2 MLJ 773 CA and *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157 CA; [2001] 2 MLJ 328 are referred to and learned counsel for the defendant submits that notwithstanding receipt by the plaintiff of the part payment, the basis for the present action against the defendant is the same as the 2001 Suit and that the first notice of demand should be the marker for the purposes of computing the six years limitation period.

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[17] Learned counsel for the defendant also contends that cl. 17 of the letter of guarantee referred to by learned counsel for the plaintiff should be read in conjunction with cl. 4 of the same document. In the final analysis, the words "legal limitation disability or incapacity" should be taken to mean "bankruptcy of insolvency" and does not refer to limitation period.

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A **Analysis And Decision**

[18] It is trite that the plaintiff has the burden to prove its case on the balance of probabilities. In respect of the defendant's election not to call any witnesses and the duty cast on the plaintiff to prove its case, the Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan*

B *Darul Naim* [2015] 2 CLJ 1037 made the following observations:

By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. In this regard, in adopting the approach of the case of *Storey v. Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in

C *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:

D There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the Court should find that the burden of proof has not been discharged.

E [19] The defendant's challenge against the plaintiff's claim is in respect of limitation period. It is not in dispute that the guarantee agreement dated 14 August 1997 is a demand guarantee whereby demand is a prerequisite to the commencement of a cause of action against the defendant as a guarantor. Lord President Salleh Abas (as His Lordship then was) speaking for the Supreme Court in the case of *Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd.* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219; [1987] 2 MLJ 610;

F [1987] 1 MLRA 53 SC held that:

In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors.

G and observed further that:

Since bank guarantees invariably specify that the liability of the guarantor is **to pay on demand**, the words are not devoid of meaning or effect but make the demand **a condition precedent** to suing the guarantor. (see

H *Paget's Law of Banking*, 9th edn., 522). (emphasis added)

I [20] In the case of *Hong Leong Bank Bhd v. M Muthiah & Anor and Another Appeal* [2014] 1 CLJ 1; [2014] 1 MLJ 1 FC, one of the questions framed for the determination of the Federal Court was whether in a cause of action based on a demand guarantee, the letter of demand must state the correct amount due. In answering the question in the negative, His Lordship Chief Justice Arifin Zakaria (as His Lordship then was) said:

[25] It is common ground that the guarantee in the present case is an on demand guarantee. As such there is stringent requirement that a demand must be issued notifying the debtor that the creditor is demanding repayment of the debt. However, contrary to the finding of the Court of Appeal, we are of the view that there is no requirement for the notice of demand to state the precise amount due. This was the decision of the Court of Appeal in *Nik Che Kok @ Nik Soo Kok v. Public Bank Bhd* [2001] 2 MLJ 328 (see also *Chung Khiaw Bank Malaysia Bhd v. Raju Jayaraman Kerpaya* [1995] 3 AMR 2337 and *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2 MLJ 305; [1988] 1 LNS 179).

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[21] After considering other authorities, the Federal Court in *Hong Leong Bank Berhad*'s case observed that:

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[29] For the above reasons we hold that it is not mandatory for the notice of demand to state the exact amount due and payable to the creditor. The purpose of the demand is only to give notice to the debtor that the creditor is demanding repayment of the sum borrowed. Accordingly our answer to the first question is in the negative.

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[22] According to learned counsel for the defendant, the first notice of demand is the valid demand and that the plaintiff's cause of action against the defendant should be taken from that date, namely it should commence after the expiry of the deadline specified in the first notice of demand. As such, learned counsel for the defendant argues that the present action is statute-barred under s. 6(1)(a) of the Limitation Act 1953 as it was only commenced on 31 May 2011 whereas the first notice of demand was dated 3 April 2001 and giving a seven day deadline.

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[23] The liability of the defendant as a guarantor depends very much on the language of the instrument and the nature of the liability it creates. The Federal Court in *The Pacific Bank Bhd. v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717 FC; [2014] 6 MLJ 153; [2014] 5 MLRA 469; [2014] 5 AMR 228 held that:

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[88] Firstly, the language of the letter of guarantee is vital; that should a guarantee **prescribes that a certain event must happen** before a cause of action accrues, for example, the making of a prior demand, then that has to be complied with before a cause of action can arise and a right to sue accrues; in other words, it is our view that whether a prior demand is a condition precedent to the creation of liability in a guarantee, depends on the precise terms of the contract. (see *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2)* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187; [1989] 3 MLJ 155). (emphasis added).

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[24] Speaking for the Federal Court in *Heng Cheng Swee v. Bangkok Bank Ltd* [1979] 1 LNS 179; [1976] 1 MLJ 267, His Lordship Lee Hun Hoe CJ (Borneo) (as His Lordship then was) said that:

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A A contract of guarantee, like all other contracts, depends primarily upon its expressed terms and the respective rights of the parties must be gathered from the guarantee form used in a particular case.

and further in *Heng Cheng Swee's* case, the Federal Court observed that:

B To determine the rights of defendant which are embodied in the guarantee, it is only necessary to look at the guarantee itself.

[25] It is not in dispute that the guarantee in question is a demand guarantee whereby the cause of action would only accrue after the demand was made against the guarantor. Clause 1 of the guarantee specifically states the words "I/We will pay you on demand."

C [26] The manner of the demand is specified in cl. 12 of the guarantee. Clause 12 of the guarantee states as follows:

12. Any demand for payment or any other demand or notice under this Guarantee may be made by any of your manager, sub-manager, secretary or other officers for the time being appointed by you or by any person or firm for the time being acting as your solicitor or solicitors by letter sent by post addressed to me/us or each of us at my/our address specified herein or at my/our last known place of business or abode and a demand or notice so sent shall be deemed to be served on the day following that on which it is posted. In proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put in the post notwithstanding that the said notice or demand may subsequently be returned undelivered by the postal authorities.

[27] In order to appreciate whether or not the first notice of demand constitute a valid demand by the plaintiff against the defendant, it is pertinent to reproduce it in *verbatim*. The first notice of demand (exh. P7) dated 3 April 2001 at p. 187 of the common bundle of documents reads as follows:

LMS/ABB(H)/16034/01

3rd April 2001

G Goh Hock Lai
No. 363 – O, Jalan Pemancar,
11700 Gelugor, Penang.

REGISTERED POST

Lim Kong Seng
No. 33, Lebuhr Mayang Pasir,
11950 Bayan Baru, Penang.

REGISTERED POST

H Tong Keng Yoon
No. 132, North Road
11700 Bukit Gelugor, Penang.

REGISTERED POST

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Dear Sir

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Re: Letter of Demand

1. Overdraft Facility of RM200,000.00
2. Term Loan I (TL I) of RM1,085,000.00
3. Term Loan II (TL II) of RM5,080,000.00

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Borrower: (formerly known as Handee Engineering & Consultancy Service Sdn Bhd.

We act for Affin Bank Berhad which pursuant to Kuala Lumpur High Court Order dated 18th December 2000 Originating Summons No. D9-24-321-2000 have taken over the assets, affairs and management of BSN Commercial Bank (M) Berhad of No. 2, Tingkat Kikik 7, Taman Inderawasih, 13600 Prai, Penang.

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2. We understand that by a Guarantee Agreement, you guaranteed to our clients payment by the said Borrower of all sums due and owing to our clients by the Borrower.

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3. We enclose herein a copy of our letter to the Borrower dated 3/4/2001 the contents of which are self-explanatory.

4. Our clients have instructed us to demand from you as guarantor, payment of the said sum of RM207,905.51 (Overdraft Facility) and RM843,850.68 (Term Loan 1) and RM5,517,596.34 (Term Loan 2) as at 28/2/2001.

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5. TAKE NOTICE that unless our clients receive the sum of RM207,905.51 (Overdraft Facility) and RM843,850.68 (Term Loan 1) and RM5,517,596.34 (Term Loan 2) together with our costs of RM115.00 within SEVEN (7) DAYS from the date hereof, we have firm instructions to institute legal action against you for the recovery of all monies due to our clients which sum shall include further interest and costs.

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Yours faithfully,

Sgd.

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c.c. 1. Affin Bank Berhad (PRAI)
(formerly BSN Commercial Bank (M) Berhad)
(Ref: PR/OD-5-13581 & TL-5-366865/REC)

2. Borrower.

[28] A perusal of the first notice of demand shows that a valid and proper demand has in fact been made by the plaintiff against the defendant in accordance with the guarantee. With respect, I am unable to accede to the argument by learned counsel for the plaintiff that the first notice of demand ceased to be valid because part payment was made. Being a demand guarantee which necessitates the issuance of a demand against the defendant

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A pursuant to the terms of the guarantee before the accrual of the plaintiff's cause of action is triggered, the plaintiff's cause of action commences from the deadline stipulated in the demand. In the present case, the first notice of demand specified a seven day deadline from the date of the notice, which means that the plaintiff's cause of action against the defendant had commenced on 10 April 2001.

B [29] The first notice of demand addressed to the borrower (at pp. 185 to 186 of the common bundle of documents) was also carbon copied to the defendant as one of the guarantors and even attached with the copy which was addressed to the defendant (at p. 187 of the common bundle of documents). This was not disputed by learned counsel for the plaintiff.

C [30] It clearly states at para. 6 of that demand addressed to the borrower that any payment made which is lesser than the amount demanded shall be accepted without prejudice to the plaintiff's right to proceed with legal action for full recovery of the outstanding loan. It means that the plaintiff could still pursue legal action if it did not receive the full amount demanded and notice of the same too has been given to the defendant. Full payment was expected by the plaintiff under the first notice of demand. Nothing less.

D [31] Therefore, contrary to the contention of learned counsel for the plaintiff, I find that the payment of RM1,630,000 did not make the first notice of demand in effective necessitating issuance of the second notice of demand to trigger the plaintiff's cause of action against the defendant. The plaintiff's cause of action having arisen on 10 April 2001 had expired when the six year limitation set in on 9 April 2007. On the facts of the present case, I find that the plaintiff's claim against the defendant is statute-barred as it was commenced more than six years after the expiry of the limitation period.

E [32] I am also of the considered view that the arguments put forth in the alternative by learned counsel for the plaintiff, that the limitation period would be 12 years by virtue of s. 21 of the Limitation Act 1953 because the plaintiff's claim is based on the letter of offer for the banking facilities and the three charges created as security, is bereft of merits.

F [33] The cases of *Sia Siew Hong v. Lim Gim Chian* (*supra*) and *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* (*supra*) are clearly distinguishable on their peculiar facts. In *Sia Siew Hong's* case, His Lordship Gopal Sri Ram JCA (as His Lordship then was) held the view that although the document in question was entitled a "guarantee", when read as a whole it was not, in effect, one but actually an indemnity whereby the appellants in that case assume the primary obligation to indemnify the respondents.

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[34] On this basis, the Court of Appeal in *Sia Siew Hong's* case held that the general rule governing limitation of actions for breach of contract was displaced by the contrary intention evinced by the parties. In that case, it was held that since the promise made by the appellants to the respondents was to indemnify the respondents against loss of the charged property, time began to run only from the date on which that loss was suffered.

[35] In *Tan Kong Min's* case, the document in question is the annexure to the charge. Being an action to recover moneys secured by a charge, the action was not founded on a claim based on contract and the 12-year limitation period under s. 21(1) of the Limitation Act 1953 applies and not the six-year limitation period under s. 6(1) of the Act.

[36] The case of *Malaysia Building Society Bhd v. Song Ah Tu (supra)* referred to by learned counsel for the plaintiff concerns an appeal against the decision of the learned Senior Assistant Registrar in allowing the defendant's application to strike out the plaintiff's claim under O. 18 r. 19(1)(b), (c) and (d) of the then Rules of the High Court 1980. In allowing the appeal, the High Court was of the view that the deed of guarantee and indemnity in question imposes a continuing liability based on the relevant clauses referred. For that reason, the defendant in that case was not allowed to raise limitation as a defence. However, in the present case, the document in question is a demand guarantee and cl. 17 is in no manner similar to the various clauses in the deed of guarantee and indemnity in *Malaysia Building Society Bhd's* case.

Conclusion

[37] Based on these reasons, I find that the plaintiff has failed to prove its claim against the defendant on the balance of probabilities. I hereby dismiss the plaintiff's claim with RM15,000 cost as agreed, subject to allocatur.

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